No. 20770

In the

United States Court of Appeals

For The Ninth Circuit

United Shoppers Exclusive, a California corporation; Mayfield, Inc., a California corporation,

Appellants,

vs.

General Electric Company, a New York corporation; Borg Warner Corporation, an Illinois corporation; California Electric Supply Company, a California corporation; Radio Corporation of America, a Delaware corporation; Whirlpool Corporation, a Delaware corporation; Maytag Company, a Delaware corporation; Maytag West Coast Company, a California corporation; General Motors Corporation, a Delaware corporation; Frigidaire Sales Corporation, a Delaware corporation; Nobbe Sales Corporation, an Indiana corporation,

Appellees.

On Appeal from the United States District Court for the Northern District of California

BRIEF FOR APPELLEE WHIRLPOOL CORPORATION

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PROCEEDINGS BELOW

Appellants, United Shoppers Exclusive (hereinafter sometimes referred to as U.S.E.) and Manfree, Inc. filed

two complaints against five retailers and eight distributors in San Francisco and ten manufacturers of TV sets and major household appliances charging a conspiracy to boycott in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §15 and 16. The complaints are practically identical, one covering the period from May 1957 to August 1960 and the other from August 1960 to August 1964.[1] The cases were consolidated for trial and the basic liability questions were delineated in the pretrial order as follows:

"Did the defendants conspire to restrain interstate trade and commerce in the sale of television sets and major household appliances in San Francisco and pursuant to such conspiracy prevent plaintiffs from obtaining television sets and major household appliances?"

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[1] Retailers charged as conspirators in the first complaint were Broadway-Hale Stores, Inc., Lachman Bros., R. H. Macy Co., Redlick-Newman Co., Sterling Furniture; distributors were H. R. Basford Co., California Electric Supply Co., Frank L. Edwards Co., Frigidaire Sales Corporation, Graybar Electric Co., W. J. Lancaster Co., Maytag West Coast Co., Leo J. Meyberg Co., Westinghouse Electric Supply Co.; manufacturers were Borg-Warner Corporation, General Motors Corporation, General Electric Co., Maytag Co., Motorola Corporation, Radio Corporation of America, Sylvania Electric Products Inc., Westinghouse Electric Corporaton, Whirlpool Corporation, Zenith Radio Corporation. The second complaint, substantially similar to the first, added the following distributors and manufacturers, Calectron, Norge Sales Corporation and Zenith Sales Corporation and dropped Westinghouse Electric Supply Co., Sylvania Electric Products Inc. and Frank L. Edwards Co.

References herein will be the same as those used by appellants. Thus reference to the Clerk's Transcript of Record will be "R.", and the Transcript of the trial proceedings "Tr." Transcripts of the pretrial hearings are referred to as "P. Tr."

"Did the defendants conspire to monopolize interstate trade and commerce in the sale of television sets and major household appliances in San Francisco, and pursuant to such conspiracy prevent plaintiffs from obtaining television sets and major household appliances?" (R. 1608-1609, Pre-Trial Order, Aug. 13, 1965)

The court ordered that the issue of liability be tried first and that the issue of damages then be tried before the same jury. (R. 1608-1609, Pre-Trial Order Aug. 13, 1965) At the conclusion of the appellants' case on the question of liability all defendant-appellees moved for directed verdicts. Their motions were granted.

STATEMENT OF FACTS

Appellants' statement of facts is incomplete, confusing and in part a distortion of the record. Accordingly, Appellee Whirlpool submits the following statement of uncontroverted facts:

At all times material to this litigation Whirlpool was a manufacturer of major household appliances (commonly referred to as white goods) bearing the brand "RCA-Whirlpool".[2] Both prior and subsequent to the creation of plaintiff corporations, Whirlpool sold these products *only* to independent distributors with title and risk of loss passing to the distributors at the point of shipment. (Exhibit 1933D-F) The distributor had the responsibility to "select, develop, train and maintain" a dealer organization. (Exhibits 101, 102 and 103).

Whirlpool's distributor for all of Northern California was Leo J. Meyberg Co. (later known as A. H. Meyer Co.) which was succeeded in mid-1964 by Calectron (Tr.

[2] Use of the mark "RCA" was authorized by its owner-appellant Radio Corporation of America. (Exhibit 12155)

5043). (This distributorship will hereinafter be referred to as "Meyer"). Meyer sold Whirlpool products to retail dealers of its choice (Tr. 1298, 5014, 5124, 5128) and Whirlpool has never interfered with its selection or designated to whom Meyer should or should not sell (Tr. 5031). While under its agreement with its distributors Whirlpool reserved the right to sell RCA Whirlpool brand products to others, it has never exercised that right (Tr. 5031).

Appellant Manfree is a concessionaire and lessee of appellant U.S.E., a so-called discount house in San Francisco. Until September, 1961 only members who paid a fee of $2.00 were admitted to the store. Thereafter it was open to the public generally. Manfree came into existence in May, 1957 following the failure of the prior concessionaire of television sets and major household appliances. During all or most of Manfree's existence, it handled white goods manufactured by Admiral, Gaffers & Sattler and Easy and TV sets manufactured by Admiral, Emerson and Olympic. During part of the period it handled white goods manufactured by Philco, Maytag, Hotpoint and Borg-Warner (Norge) and TV sets manufactured by Zenith.[3]

At no time did any representative of Whirlpool visit the premises of U.S.E. nor was it aware of the lines carried by or denied to Manfree, or when denied, the reasons for such denial.

Whirlpool first learned of appellant Manfree six weeks before it was sued. It received a letter dated June 24,

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[3] These goods were handled during the following periods: Philco, May 1957-September 1958; Maytag January 1958-April 1959; Hotpoint, May 1957-October 1958; Borg-Warner, May 1957-September 1957.

1960 in which Manfree requested that Whirlpool submit carload prices and authorization to carry its line. (Ex. 1710). A similar letter dated July 25, 1960 (Ex. 1715) was also received by Whirlpool. These were referred by Whirlpool to its distributor Meyer and Manfree was notified to contact Meyer. (Ex. 1711, 1718 and 1721). The evidence reveals that Manfree was previously aware that Meyer was the distributor of RCA-Whirlpool products and had contacted Meyer. (Ex. 1703, 1704, 1705, 1706). During the pendency of this litigation Manfree wrote additional letters to Whirlpool requesting its line. (Ex. 1716 and 1722). Whirlpool again responded to the letters by advising Manfree that its distributor in the area was Meyer Company (as appellants well knew), that Manfree's letters were being referred to Meyer and suggesting that the request to handle its line should be discussed with that company. (Ex. 1711, 1718 and 1721). What transpired between Meyer and Manfree was never reported to Whirlpool. (Tr. 1293, 1295, 5013, 5014). Except for the letters referred to above, Whirlpool had no contact with either appellant.

In 1957 Whirlpool, which up to that time was a manufacturer only of laundry equipment, expanded its products to include a full line of white goods consisting of ranges, freezers, dishwashers and refrigerators in addition to laundry equipment. It then embarked upon a nationwide advertising campaign to promote the sale of these new products. (Tr. 5162). As part of this program Whirlpool matched funds with distributors to be used to advertise and promote RCA-Whirlpool brand merchandise in the local markets throughout the country. (Tr. 5162, 5163). Such funds were made available by Whirlpool only to its distributors. (Tr. 5061, 5065). The distributor, at its option, could use these funds to run dealer

listing type of advertisements,[4] could make them available to retail dealers as part of its own cooperative advertising programs, or could use them for advertising under the names of dealers or for in-store promotion by dealers selected exclusively by the distributors. (Tr. 579-580, 5028, 5031, 5062, 5066-5083, 5088, 5090, 5099, 5124-26 Ex. 5085).

As part of this program Whirlpool also ran fully-paid factory ads in the Sunday supplements of newspapers throughout the country. (Tr. 5176).

During the period prior to July 1961 Whirlpool's price lists to its distributors contained suggested retail prices on some, but not all of the items listed. These suggested retail prices were not a part of Meyer's pricing structure. (Tr. 649). Meyer issued its own price lists to its dealers. (Tr. 641-643). They contained Meyer's suggested retail prices. A hand-picked study introduced in evidence by appellants disclosed that in approximately 40% of the instances considered the suggested retail price of Meyer differed from that of Whirlpool. (Ex. 5115). Beginning July, 1961, Whirlpool suggested no retail prices whatsoever. (Ex. 1934, 1935).

The advertising policy of Meyer was to make funds available to dealers only if they advertised at Meyer's suggested retail price or showed no price at all. (Tr. 603, Ex. 1161). Whirlpool did not know of this policy. (Tr. 5028). Nor was it aware of the advertising policies or practices of the alleged co-conspirators.

The prices at which Whirlpool products were sold by dealers were "all over the lot" (Tr. 5029) and according to Manfree's own manager the biggest price-

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[4] An advertisement of Whirlpool products over the names of several dealers.

cutter of all was the alleged co-conspirator, Hale, who during the period of the alleged conspiracy closed its San Francisco major appliance stores. (Tr. 5648).

Not only did Whirlpool sell its products and make cooperative advertising funds available only to Meyer, but its contacts with dealers were minimal. Except for the showing of its new lines, to which dealers were invited, the record discloses only two meetings between a Whirlpool representative and representatives of any retailer. One was a social meeting, the other occurred in November, 1958, a year and a half before Whirlpool even heard of appellants (Tr. 1501 and 576-579) at which time, when the question of price arose, Whirlpool advised the dealer that pricing was the responsibility of the distributor and that it would not discuss the subject. (Tr. 587).

Whirlpool was not a member of nor did it attend any meetings of the Better Business Bureau, Northern California Electric Bureau, Retail Furniture Association or any other local organizations referred to in the evidence. Nor did any Whirlpool representative meet with any representative of the distributors of any other brand product or the local newspapers. Neither Manfree nor U.S.E. was ever discussed by or in the presence of any Whirlpool representative nor were they, or either of them, the subject of any correspondence received or sent by Whirlpool.

During the period in question, Whirlpool was a member of the National Electric Manufacturers Association (N.E.M.A.) and American Home Laundry Manufacturers Association (A.H.L.M.A.). As part of N.E.M.A.'s market research program each member reported to N.E.M.A. the number of units of each product sold to

dealers in each county and state. Since Whirlpool did not sell to dealers and its distributors covered more than one County (it had only one for all of Northern California), it secured this information from its distributors and reported it to N.E.M.A. No information as to purchases by individual dealers was listed in Whirlpool's reports to N.E.M.A. (Tr. 5176-77). The Association reported back to the manufacturers the total industry sales by county and state, and then, the factory from its own records determined its degree of market penetration in each county and state. (Tr. 5038).

Mr. Walker, the Whirlpool Regional Sales Manager for the area from Alaska to the Mexican Border and from Denver to and including Hawaii, also utilized the information furnished Whirlpool by its distributors to compile for them marketing information. Thus in 1966 he prepared for each of the distributors in this region a list of dealers by county who, in the smaller market areas, purchased 25, or in the larger market areas, purchased 50 units of a given product in any of the years listed, 1960-1966. Such an account was described as a key account and the purpose of the listing was to assist the distributor in determining the trend of each of its dealer's sales. (Tr. 5043, 5044, Ex. 5081).

SUMMARY OF ARGUMENT

The gravamen of appellants' complaint is a charge that Whirlpool and others conspired to boycott Manfree and thus deny it TV sets and major household appliances. At the close of appellants' evidence the trial Court directed a verdict.

Appellants concede that they offered no direct evidence of conspiracy and the record is void of any evidence

from which conspiracy can be inferred. With respect to Whirlpool the evidence affirmatively established that Whirlpool did not sell appellants just as it did not sell any other dealer in the San Francisco area because it was not in the business of selling dealers; that its products were sold to and distributed solely by an independent local distributor; that Whirlpool did not interfere with or concern itself about that distributor's selection of customers; that it was unaware of the brands of merchandise handled by or denied to Manfree and where these brands were denied Manfree, Whirlpool was unaware of the reason for such denial. Appellants failed to prove a *prima facie* case and hence the action of the trial court in directing a verdict was patently proper.

The orders and rulings of the Court with respect to discovery, separation of issues for trial and the receipt and rejection of evidence concerning which appellants complaint were clearly proper and in any event harmless.

ARGUMENT

THE EVIDENCE AND ALL INFERENCES REASONABLY TO BE DRAWN THEREFROM DOES NOT ESTABLISH A PRIMA FACIE CASE OF CONSPIRACY ON THE PART OF WHIRLPOOL AND THE COURT, THEREFORE, CORRECTLY DIRECTED A VERDICT.

Appellants contend that five department stores in San Francisco were the nucleus of a great conspiracy participated in by numerous distributors and manufacturers of TV sets and major household appliances as well as the morning newspapers of San Francisco, and that the object of the conspiracy was to boycott them "because . . . appellants were a discount store operation which threatened the San Francisco retail market controlled by appellees and their co-conspirators." (App. Br. p. 86).

Appellants offered no direct proof of conspiracy. Rather, they rely upon circumstantial evidence. But all the evidence, voluminous as it is, viewed in a light most favorable to appellants raises no inference of conspiracy on the part of Whirlpool, and therefore the trial court correctly directed a verdict in its favor.[5]

The test to be and that which was applied by the trial court in taking this case from the jury is well settled in law and was laid down in this Circuit in *Independent Iron Works, Inc.* v. *United States Steel Corporation,* 177 F. Supp. 743, 746 (N.D. Cal. 1959), aff'd. 322 F. 2d 656 (9th Cir. 1963), cert. den'd. 375 U.S. 922 (1963):

> "On these motions [for directed verdicts] plaintiff is entitled to and must receive the benefit of all

[5] In Whirlpool's view appellants failed to prove conspiracy on the part of any appellee.

> favorable inferences which can be drawn from the evidence. *The plaintiff, however, still has the burden of establishing a prima facie case.* He must rely upon reasonable and logical inferences from the evidence in the record. *The plaintiff cannot go to the jury on the basis of speculation, surmise or conjecture. Wolfe* v. *National Lead Company,* 9th Cir. 1955, 225 F. 2d 427, 433-434." (emphasis supplied).

Forced and violent inferences may not be drawn. *Galloway* v. *United States,* 319 U.S. 372, 395 (1943) and "mere speculation must not be allowed to take the place of probative facts". *Safeway Stores* v. *Fannan,* 308 F. 2d 94, 97 (9th Cir. 1962).

While a conspiracy may be shown by circumstantial evidence,

> ". . . the facts and circumstances relied upon must attain the dignity of substantial evidence and not be such as to merely create a suspicion." (*Johnson* v. *J. H. Yost Lumber Co.,* 117 F. 2d 53, 61 8th Cir. 1941).

Whirlpool, in the exercise of its business judgment, long before either appellant came into existence, determined not to sell directly to retail dealers in Northern California, but to sell only to an independent distributor, Meyer. There is no question that Whirlpool did not deviate from that policy when it received inquiries from Manfree and that it did not sell Manfree, just as it did not sell any other retail dealer in Northern California, discount house or otherwise. (Tr. 5031). But Whirlpool's refusal to change its method of distribution simply because it received an inquiry from Manfree is not a fact from which an inference of conspiracy can be drawn. It is firmly established in law that absent illegal agree-

ment one may select its own customers. *United States* v. *Colgate,* 250 U. S. 300 (1919).

> "From the mere fact of refusing to sell to plaintiff, there can therefore arise no inference of an unlawful agreement, because one may lawfully select his own customers. *Great Atlantic and Pacific Tea Co.* v. *Cream of Wheat Co.,* 2 Cir. 227 F. 46; *Union Pacific Coke Co.* v. *United States,* 8 Cir., 173 F. 737; *United States* v. *Colgate & Co.,* 250 U.S. 300, . . ." (*Johnson* v. *J. H. Yost Lumber Co.,* 117 F. 2d 53, 61, 8th Cir. 1941, *Amplex of Maryland Inc.* v. *Outboard Marine Corp.,* 380 F. 2d 112, 4th Cir. 1967).

This is true in those cases where the seller normally and customarily sells to the class of trade of which the refused prospective customer is a member. It would seem unnecessary to argue that a manufacturer may legally determine, as did Whirlpool, to sell its product only to its distributor. In the absence of an illegal agreement one "may sell or refuse to sell to a customer for good cause or for no cause whatsoever". *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368-376 (9th Cir. 1957). Appellants do not, as indeed they cannot, deny that Whirlpool had good cause to refuse to sell Manfree; that it was Whirlpool's long-established policy to sell only to one distributor in Northern California and that it had never deviated from that policy. Instead they argue (page 99 of appellants' brief) that in the agreement appointing Meyer its distributor it reserved the right to sell others. But that is beside the point. The fact remains it has never exercised that right and has at all times acted in complete conformity with its long-established policy of selling only to the distributor.

Groping desperately for some reed to grasp in an attempt to attach an iota of respectability to their com-

pletely untenable claim that the refusal of Whirlpool to sell Manfree has significance, appellants, at page 100 of their brief state that "Whirlpool sold its 'Coldspot' and 'Kenmore' brands of appliances directly to Sears, Roebuck and Co. which maintained retail stores in the market area (Tr. 5051-5052)", thus neatly ignoring the fact that the line of product involved in this case is the RCA-Whirlpool line and not private brands manufactured by Whirlpool for others.

Having taken over two years to write their 200-page brief, it is difficult to perceive that in their long and meticulous search of the record, appellants' attorneys did not notice, even if their memory of what occurred at the trial had failed them, that the testimony to which they refer this Court does not relate to the brand of products in question and had been stricken from the record. (Tr. 5052).[6]

Nor does the fact that Whirlpool refused to sell Manfree give rise to an inference of conspiracy because its refusal allegedly paralleled the refusal of other manufacturers and distributors who likewise refused to deal, or having dealt with, refused to continue their relationship with Manfree. The record is completely void of proof that Whirlpool ever had knowledge of the actions of others much less that it acted pursuant to a common commitment, and, it is axiomatic that one cannot be a party to a conspiracy of which he has no knowledge. Thus, in *United States* v. *Standard Oil Company,* 316 F. 2d 884 (7th Cir. 1963), the court said:

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[6] Since this evidence was stricken it became unnecessary for Whirlpool to prove that which is a matter of public record. Kenmore and Coldspot trade names are owned by Sears, and Whirlpool had no right to sell such products.

> "The substantive law of trade conspiracies require some consciousness of commitment to a common scheme. *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp., et al.,* 346 U.S. 537, 540-541. It has been stated there is no such thing as an 'unwitting conspirator'. *United States* v. *National Malleable & Steel Castings Co.,* N.D.Ohio 1957 CCH Trade Cases Par. 68890, at p. 73601. Unless the individuals involved understood from something that was said or done that they were, in fact, committed to raise prices, there was no violation of the Sherman Act." (p. 890).

On remand, the trial court in Standard Oil instructed the jury on the issue of conspiracy as follows:

> ". . . The gist of the offense of conspiracy is an agreement among the conspirators to commit an offense. No conspiracy in violation of the Sherman Act occurs unless it is established beyond a reasonable doubt that there is a *conscious commitment to a common scheme.* Unless the persons involved understand from something that was said or done that they were committed, there can be no conspiracy, and, hence, no violation of the Sherman Act." . . . (Emphasis added) (N.D.Ind. 1964 p. 427, 432-433; American Bar Association, Jury Instructions In Criminal Anti-Trust Cases, p. 412, 432, 1965).

See also *United States* v. *Falcone,* 311 U.S. 205, 210 (1940); *Johnson* v. *J. H. Yost Lumber Co.,* 117 F. 2d 53 (8th Cir. 1941).

If there is one thing clear from the record in this case it is Whirlpool's complete lack of knowledge concerning Manfree, the latter's relationship with the alleged co-conspirators and the actions generally of those alleged co-conspirators. All that Whirlpool knew about Manfree is that it received letters from that company seeking to buy its line and that in keeping with Whirlpool's

policy not to sell dealers it referred those letters to Meyer. Whirlpool's representatives never visited U.S.E. nor did they discuss appellants with Meyer after referring Manfree's letters to it. Whirlpool simply did not concern itself with Meyer's selection of dealers. That was Meyer's responsibility. (Ex. 101, 102 and 103).

By virtue of a report of sales to dealers made to it by its distributor Whirlpool could have ascertained that Manfree, like many other dealers in San Francisco, did not purchase RCA-Whirlpool brand products. But this fact without more, and there is no more in the record, lacks signifiance. There are literally a dozen reasons why Meyer might have decided not to sell Manfree and an equal number of reasons why Manfree might have decided not to buy from Meyer after the letters sent to Whirlpool were referred to the distributor. It is uncontroverted that the refusal by Meyer to sell Manfree was not discussed with Whirlpool. (Tr. 1293, 1295, 5013, 5014).[7]

And the fact that a distributor refuses to sell a dealer does not give rise to an inference of a conspiracy between the manufacturer and the distributor. Thus, in *Brosius* v.

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[7] Contrary to appellants' brief (p. 68) stating that Mr. Sanford of Meyer testified that he believed Meyer could not sell to Manfree because of the downtown stores, Sanford's testimony shows no such belief. The citation in appellants' brief (p. 68) refers to the following question, "You had the belief, did you not, that in order to have your downtown stores handle the Whirlpool Corporation (sic) that you would not be able to sell to discount stores? The unequivocal answer was, "I did not." (Tr. 1288-1289).

The evidence disclosed that the reason given for Meyer's refusal to sell to plaintiffs was that Meyer simply was not interested in adding a dealer at the time of Manfree's request. (Tr. 4992-4993, 5893-5894).

Pepsi Cola, 155 F. 2d 99 (3rd Cir. 1946), the Pepsi Cola Company and Cloverdale Spring Company entered into a contract whereby the latter was appointed exclusive distributor for the trademarked soft drink called "Pepsi Cola". For a period of about six years the distributor sold Pepsi Cola to the plaintiff who resold and distributed the product in a designated territory. A controversy arose between plaintiff and the distributor, in consequence of which the distributor refused to continue supplying Pepsi Cola to the plaintiff, whereupon the plaintiff took the matter up directly with the officers of Pepsi Cola Company without result. He then brought suit claiming that Pepsi Cola Company and its distributor were conspiring in violation of the antitrust laws. Commenting upon this phase of the case when affirming judgment for defendants, the Appellate Court stated:

> "Brosius, upon meeting with the situation described, appealed to officers of Pepsi Cola Company, and he contends that the treatment accorded him, together with the contract and the refusal of Cloverdale to sell to him, proves the conspiracy alleged.
>
> "We are unable to make anything more out of the interviews with Pepsi Cola officials than they do not interest themselves with the distributor's business so long as he adheres to the contract and the volume of business is regarded by them as satisfactory. Such a policy is not unusual and is simply good business in a competitive economy." (p. 102)

There is no evidence that either Manfree or U.S.E. was discussed by or in the presence of any Whirlpool representative with any other manufacturer, distributor, dealer or newspaper or any other person or that Whirlpool ever knew what brands were handled by or denied to Manfree and when denied, the reason for

such denial. There is no evidence that U.S.E. or Manfree were the subject matter of or mentioned in any correspondence received by or sent by Whirlpool or in any of its inter-office communications.

Nor did Whirlpool involve itself with the local market, as appellees by distorting the record, argue. The record is clear that Whirlpool dealt only with Meyer and that its representatives visited retailers only when so requested by Meyer (Tr. 5061). It did not, as appellants assert at pages 83 and 99 of their brief have numerous meetings or constant communications with Hale or other retailers in San Francisco. As a matter of fact the very citations and exhibits to which appellants brazenly refer this Court as support for these assertions do not disclose even one meeting or one communication between Whirlpool and any retailer in San Francisco. This testimony and these exhibits actually refute appellants' assertions and highlight their distorted presentation of the facts. Thus, for example, Mr. Walker testified at page 5060 that he did not know if any Whirlpool representative ever visited any retailer in San Francisco. At pages 5053 and 5054 he did not testify to any visits to retailers, but rather that he compiled a report of retailers' trend of sales on the basis of information furnished Whirlpool by Meyer.

In fact the entire record discloses that except for the showing of its new lines, to which dealers were invited, only two meetings were held between a Whirlpool representative and representatives of any retailer in the San Francisco area. One of these was a social meeting (Tr. 1501), the other occurred in November, 1958, a year and a half before Whirlpool ever heard of appellants. (Tr. 576-579)

This is the state of the record from which appellants argue that a jury should have been permitted to infer

that Whirlpool knew of and was a party to an alleged conspiracy. Here the record not only discloses that Whirlpool, in refusing to sell Manfree, acted unilaterally in conformity with its long-established policy to sell only to independent distributors and not to dealers, but it also uncontrovertably discloses that Whirlpool so acted completely unaware that some others were likewise refusing to sell Manfree. Thus, the proof in this case does not even reach the level of conscious parallelism much less does it disclose that Whirlpool was invited to, joined in or was a party to any conspiracy.

Hence, appellants have failed to prove the most basic prerequisite of their claim of conscious parallelism and conspiracy against Whirlpool. They totally failed to prove that Whirlpool had knowledge of those facts which they claim give rise to an inference of conspiracy.

Moreover, assuming *arguendo* that Whirlpool knew that others also refused to sell Manfree, such fact standing alone would at best show no more than conscious parallelism. But conscious parallelism cannot be equated with conspiracy; and the Sherman Act proscribes conspiracy, not conscious parallelism. Cases to this effect are legion.

In *Theatre Enterprises, Inc.* v. *Paramount Distributing Corporation*, 346 U.S. 537 (1954), the Supreme Court of the United States stated:

> ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement, or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." (p. 541)

And this Court in affirming a directed verdict in *Independent Iron Works* v. *United States Steel Corp.*, 322 F. 2d 656, 661 (9th Cir. 1963) said:

> "The mere fact that two or more of the defendants dealt with plaintiff in a substantially similar manner *does not support an inference* of conspiracy, even though each knew that the business behavior of another or the others was similar to its own." (Emphasis supplied)

And previously in *Chorak* v. *R.K.O. Radio Pictures*, 196 F. 2d 229 (9th Cir. 1952), *cert. denied* 344 U.S. 887 (1952), *reh. den'd.* 344 U.S. 910 (1952), this Court, quoting Mr. Justice Hand, said:

> "At best an inference of conspiracy would only arise [from similar business conduct] if it appeared more to the interest of the distributors involved to adopt a different pattern of distribution than the one actually employed."

The decisions of other circuits are to the same effect. In *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 324 F. 2d 652, 653 (1st Cir. 1963), the court sustained a directed verdict for defendants stating:

> "The plaintiff must introduce evidence from which the jury could reasonably infer concert of action. *We have never recognized conscious parallelism, standing alone, as sufficient to sustain such a finding.*" (Emphasis supplied)

In *Naumkeag Theatres Co.* v. *New England Theatres, Inc.*, 345 F. 2d 910, 911 (1st Cir. 1964) the Court clearly enunciated the requirement that some meaningful factors must be proved in addition to proof of conscious parallelism before a case is submissible to a jury. The Court said:

> "However, conscious parallelism is concededly not enough. *Brown* v. *Western Massachusetts Theatres, Inc.*, 1 Cir., 1961, 288 F. 2d 302; *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 1 Cir., 1963, 324 F. 2d 652. Plaintiff's burden is to show that there was evidence warranting a finding of something additional from which a reasonable inference of conspiracy may be made, or, as it puts it, of conscious parallelism 'plus'."

See also *United States* v. *Standard Oil Co.*, 316 F. 2d 884 (7th Cir. 1963), *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1963), *Brown* v. *Western Mass. Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961), *Gold Fuel Service, Inc.* v. *Esso Standard Oil Co.*, 195 F. Supp. 85 (D. N.J. 1961), *aff'd.*, 306 F. 2d 61 (3rd Cir. 1962), *cert. den'd.*, 371 U.S. 951 (1963), *Eastern Fireproofing Co.* v. *U.S. Gypsum Co.*, 21 F.R.D. 292 (D. Mass. 1958), and *Interborough News Co.* v. *Curtis Publishing Co.*, 127 F. Supp. 286, 301 (S.D. N.Y. 1954, *aff'd.*, 225 F. 2d 289 (2nd Cir. 1955).

Appellants' approach to Whirlpool's refusal to sell Manfree is overly simplified and indeed their approach to the doctrine of conscious parallelism generally is distorted and erroneous.

The first defect in their position lies in their failure to recognize that even conscious parallelism is meaningless standing alone and assumes significance only in conjunction with other meaningful facts from which a jury can reasonably and logically infer, rather than speculate, that the parallel action stemmed from agreement, not individual actions. The second fallacy of their position is their utter failure to recognize that the record is totally void of evidence that Whirlpool acted with knowledge of the actions of others. Thus appellants have failed to dis-

tinguish those cases where only conscious parallel behavior was shown, requiring directed verdicts at the close of plaintiff's proof (such as *Independent Iron Works, Inc.* v. *United States Steel Corporation,* 322 F. 2d 656, 9th Cir. 1963 and *Winchester Theatre Co.* v. *Paramount Film Distributing Corp.*, 324 F. 2d 652 1st Cir. 1963), and those in which some meaningful "plus factors" were demonstrated in addition to the defendant's conscious parallel behavior, and the Court thus found sufficient evidence to permit a jury to determine whether a conspiracy existed.

Speciously, appellants' brief relies almost *in toto* on cases in which these "plus factors" were present to support its conclusion that proof of a common refusal to deal is *alone* sufficient to submit a case to the jury. (Appellants' Brief, p. 94-96). The most flagrant example of appellants' misplaced reliance on the cases they cite is their reliance upon *Milgram* v. *Lowes, Inc.*, 192 F. 2d 579, 583 (3rd Cir., 1951) cited for the proposition that uniformity in refusing to sell alone forms the basis of a permissible inference of joint action. (Appellants' Brief, p. 95). The Court there specifically restricted its holding to the facts presented which included a plus factor, (all defendants acted in contradiction to their self-interests) stating:

> ". . . this does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, *in themselves*, from which a Court may infer concerted action. *Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self-interest.* This strengthens considerably the inference of conspiracy, for the conduct of the distributors, is, in the absence of a valid explanation, inconsistent with decisions independently arrived at." (p. 583) (Emphasis supplied)

Certainly it cannot be said that Whirlpool's refusal to change its long-established distribution policy was in contradiction to its best interests. Both the cases of *Standard Oil Co. of California* v. *Moore*, 251 F. 2d 188 (9th Cir. 1957) and *Girardi* v. *Gates Rubber Co. Sales Division, Inc.*, 325 F. 2d 196 (9th Cir. 1963) heavily relied on by the appellants in their brief likewise contained plus factors, not present here. The General Motors case (*United States* v. *General Motors Corp.*, 384 U.S. 127 1966) is distinguishable as there was clear and convincing evidence of an agreement and conspiracy.

While arguing at page 95 of their brief that uniformity in refusing to sell alone forms the basis for an inference of conspiracy, appellants tacitly recognize that such proof is insufficient by attempting, albeit abortively, to create the illusion of some "plus factor". They argue, without support in the record, that Whirlpool's conduct was motivated by a desire to maintain its suggested, though most frequently non-existent, list prices and by pointing to the advertising policy of Meyer and others, policies which were unknown to Whirlpool.

Appellants have not, and indeed they cannot, point to one instance in which Whirlpool evinced any interest in maintaining its or any suggested list prices. Whirlpool's suggested retail prices never became a part of Meyer's pricing structure, nor was Whirlpool consulted by Meyer in establishing that company's own suggested retail prices. (Tr. 649)

Refuting appellants' contention that Whirlpool was interested in maintaining its suggested retail prices is appellants own exhibit (Ex. 5115). This study reveals that in approximately 40% of the instances considered the suggested retail price of Whirlpool and that of Meyer differed. Furthermore, this study was patently incomplete

because of the failure to give any consideration to the numerous instances where Meyer suggested retail prices on items for which Whirlpool had no suggested prices. Also evidencing Whirlpool's total lack of interest in maintaining its suggested retail prices is its abandonment of their use after mid-1961 and the fact that prices on Whirlpool products were all over the lot. (Tr. 5029)

Even if, contrary to the fact, the evidence had revealed that Meyer suggested retail prices to dealers that were constantly the same as or were based upon those suggested by Whirlpool as appellants repeatedly, though erroneously argue, such proof would not aid appellants. It is still the law that mere suggestion of retail prices does not violate the Sherman Act. (*United States* v. *Colgate and Company*, 250 U.S. 300, 1919; *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 1960). Nor does voluntary adherence thereto, even with knowledge that failure to do so will result in the termination of business relations, constitute a conspiracy between seller and buyer. (*Klein* v. *American Luggage Works, Inc.*, 323 F. 2d 787, 3rd Cir. 1963). Therefore, no inference of conspiracy can arise from the fact that Whirlpool did suggest or any person had voluntarily followed such suggested retail prices.

Appellants' attempt to create an illusion of illicit purpose from the evidence of suggested retail prices and advertising policies becomes even more untenable in view of their total failure to prove that Whirlpool knew of the "no cut price" advertising policy of Meyer or any other alleged conspirator. Faced with a record completely void of evidence of such knowledge or any facts from which such knowledge could be inferred appellants make a strained attempt to support their contention of knowledge at pages 92, 124 and 132 of their brief, arguing without facts to support the argument, at page 92 that the "practice must have been known and approved by the manufacturer" and

at page 124 with reference to Mr. Walker's testimony directly denying knowledge of such practice (Tr. 5028); ". . . Whirlpool knew that San Francisco retail price margins on the subject goods were higher than elsewhere because of price demands made by representatives of its key accounts in San Francisco directly to its offices." To say that because one knows that retail prices are higher in San Francisco than in certain other areas, an inference can be drawn that such person knows of a "no cut price" advertising policy of a distributor is a complete non-sequitur. Moreover, Exhibit 4227 to which appellants refer the Court discloses on its face that it contains information received by a Whirlpool representative from Meyer and not, as appellants state, from representatives of dealers.[8] Exhibit No. 1161 which the appellants cite at page 132 of their brief to support their contention that Whirlpool was shown by "substantial evidence . . . to have been aware of Meyer's utilization of cooperative advertising policies under which a dealer was required to follow retail list prices" is simply a copy of the Meyer advertising agreement with Hales. Mr. Walker testified he had no knowledge of this policy (Tr. 5028); there was no other evidence that Whirlpool was aware of the policy and certainly the existence of the Exhibit itself is no basis for inferring Whirlpool's "awareness" of it.

Nor is Whirlpool charged with knowledge of or responsibility for the advertising policy or actions of Meyer

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[8] Appellants even misquote the document in their brief (page 37) to read ". . . larger margins requested by key accounts". The exhibit contains the word "required" not 'requested'. Appellants also fail to note that the evidence disclosed that the report contained information gleaned from a visit to Meyer by a Whirlpool representative who had just been transferred to San Francisco from a part of the country where the level of prices was lower than San Francisco. (Tr. 5139-5140)

under the doctrine of *respondeat superior* for Meyer was an independent trader and not the agent of Whirlpool. Meyer was a separate corporate entity. Its relationship with Whirlpool is that of buyer and seller. Title and risk of loss passed from Whirlpool to Meyer at the point of shipment. Meyer was obligated to pay for the goods it purchased from Whirlpool monthly (Ex. 1933D-F). Whirlpool is therefore not liable for Meyer's conduct, even had it been tortious, nor could Meyer's knowledge be imputed to it. (*Matthews Conveyor Co.* v. *Palmer-Bee Co.,* 135 F. 2d 73, 6th Cir. 1943; *Western Fruit Growers Sales Co.* v. *F.T.C.,* 322 F. 2d 67, 9th Cir. 1963; *Standard Fashion Co.* v. *Magrane Houston Co.,* 259 Fed. 793, 1 Cir. 1919, aff'd. 258 U.S. 346, 1922; *Hilyer* v. *Union Ice Co.,* 45 Cal. 2d 30, 286 P. 2d 21, 1955; *Bohanon* v. *James McClatchy Tub Co.,* 16 Cal. App. 2d 188, 60 P. 2d 510, 1936; *Alvarez* v. *Felker Mfg. Co.,* 230 Cal. App. 2d 986, 1964; *Simpson* v. *Union Oil Co. of Calif.,* 377 U.S. 13, 1964; Restatement Second, Agency § 14J).

Appellants also seek to create the illusion that Whirlpool jumped at the snap of Hale's fingers and gave Hale favored treatment in making advertising funds available for it and in furnishing it special models. The sum and substance of the evidence on Whirlpool's advertising and promotional allowance funds is that Whirlpool matched funds with the distributor to be used to advertise and promote RCA-Whirlpool brand merchandise locally and that these funds could, at the option of the distributor, be run over the names of dealers selected by it.[9]

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[9] These funds were in addition to Whirlpool's regular cooperative advertising program which was based upon a distributor's sales volume.

To support this argument, appellants at no less than seven places in their brief advert to a single instance in 1959 when at the behest of Meyer, Whirlpool allocated $6,000 which was matched with an equal sum by Meyer to be used for in-store promotions and advertising of RCA-Whirlpool products at Hale's six locations. The program aborted and less than $3,500 of the money allocated by Whirlpool was used. Moreover, there is no evidence that proportionally equal treatment was not afforded to others. Hence it cannot even be said that this transaction was in any way illegal under the Robinson Patman Act, much less can it be said that it proves conspiracy. As the District Court said, "such evidence in no way constitutes proof of any conspiracy in restraint of trade or any other sinister purpose". (Trial Court Memorandum Opinion p. 11).

In advancing the argument that Whirlpool furnished alleged co-conspirator Hale special models (appellants' brief, p. 40, 100), appellants take an unpardonable liberty with the record to present a meaningless point. Whirlpool did from time to time manufacture and sell to and only to its distributors special or what it describes as variation models. These contained features other than those appearing in its regular line. They were not manufactured to be offered or sold, as appellants contend, only to Hale or so-called key accounts, and there is not one iota of evidence in the record to support this claim. To the contrary, the record clearly and uncontrovertably discloses that these models were available to the distributor to sell to whom he chose. (Tr. 5130-5131). The very document introduced by appellants in which Whirlpool announced the availability of these models to Meyer stated, "Sales to utilities, sales to key accounts and special sales events with *dealers generally* are all possible through aggressive merchandising of this program." (Ex. 1935 Q, R., emphasis added)

While appellants' evidence of suggested retail prices, advertising programs and variation models has no probative value in proving an alleged conspiracy, it is not without value. By attempting to attach anti-trust implications to Whirlpool's commonplace and legitimate business activities through the device of distorting the record, appellants tacitly concede they have no case against Whirlpool.

Appellants also contend that certain other manufac turers and/or distributors provided special models to the alleged co-conspirator-retailers, gave them special advertising allowances and that certain manufacturers and distributors in addition to Meyer geared these allowances to ads featuring only suggested retail prices. But the record is clear that Whirlpool did not know of any such actions.

The sum and substance of all the evidence insofar as Whirlpool is concerned is that its refusal to sell Manfree was strictly a unilateral one made in conformity with its long-established policy to sell only one distributor in northern California and not to sell directly to dealers; that it acted without knowledge of any refusals to sell or to continue to sell Manfree, or the reasons therefor of others including Meyer; that it was without knowledge of or responsible for the advertising policy or other practices of Meyer and others which appellants contend raises an inference of conspiracy.

Hence the record contained no facts from which a jury could reasonably or rationally conclude that Whirlpool knew of, agreed to, or participated in any form of conspiracy, and the action taken by the District Judge in directing a verdict was the only legally correct action warranted by the evidence.

THE RULINGS OF THE DISTRICT COURT EXCLUDING WHIRLPOOL CREATED DOCUMENTS EXHIBITS 5086, 1714 AND 5077 WERE CORRECT, AND IN ANY EVENT HARMLESS.

Appellants complain of the exclusion of certain documents. Three were created by Whirlpool, the balance by others. In this section we will deal with the Whirlpool-created documents; in the next section, with those documents created by others.

(a) Exhibit 5086—Appellants complain because the Court refused to permit them to show that two directors of RCA were also directors of Whirlpool. Such proof would have added nothing to appellants' case. The Court therefore properly excluded this evidence and in any event its exclusion was harmless.[10]

(b) Exhibit No. 1714—This Exhibit is a copy of a one-sentence letter from Whirlpool to Meyer which refers to the "attached inquiry." But there was no attachment to the Exhibit, nor was any evidence offered identifying "the attached". Had the Court received the exhibit the jury would have been left to speculate as to the identity of "the attached". Accordingly the Court properly excluded the document. Moreover, if as appellants contend (Appellants' brief page 151), the attachment was Manfree's request to Whirlpool for RCA-Whirlpool products, the exclusion was harmless since it was at all times admitted that Whirlpool referred these requests to Meyer.

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[10] Contrary to appellants' brief (page 151) in which they state that there was a "corporate affiliation" and "interrelationship" between RCA and Whirlpool, the evidence affirmatively reveals that RCA and Whirlpool are and were two distinct corporate entities (Tr. 573-575), and that neither had anything to do with the administration or policies of the other.

(c) Exhibit 5077 (A-D)[11]—This Exhibit does not show, as appellants state, any discussion by a Whirlpool representative with retailer representatives nor does it disclose, as appellants argue, that Whirlpool gave preferential treatment to Hale. Rather, on its face, the Exhibit is a report of information gleaned by a Whirlpool representative from a visit at the Meyer Company including information that additional advertising funds were being sought for advertising of RCA-Whirlpool products by Hale's, the Emporium and Macy's. There is no evidence they were obtained. The document was irrelevant, its exclusion was proper and in any event harmless.

THE COURT PROPERLY EXCLUDED THE SO-CALLED N.E.M.A. AND A.H.L.M.A. DOCUMENTS —EXHIBITS 2093, 2094, 2095, 2097, 2098, 2099, 3000, 3003, 3004, 3006, 3007, 3010, 431, 3024, 3026, 3036 AND IN ANY EVENT THEIR EXCLUSION WAS HARMLESS.

Appellants complain of the ruling of the Court in excluding the above-mentioned Exhibits purporting to be the minutes of NEMA, in the case of Exhibit 3007 a letter from NEMA, in the case of Exhibit 431 an interoffice communication of the Norge Sales Corporation, in the case of Exhibits 3024 and 3036 a letter from AHLMA to Mr. Bull of Norge Sales Corporation. The rulings of the Court were patently correct for several reasons. First, no foundation was laid for their admission. No evidence was received and none was even proffered to prove that those documents purporting to be minutes of NEMA were in fact such minutes, that they were made in the ordinary course of business at or about the date they bear or that they correctly set forth that which they purport to set

[11] Sections A and B of this Exhibit were never offered into evidence. (Tr. 5053-5054)

forth. The "foundation" for these Exhibits constitute no more than the request by Mr. Keith, counsel for appellants, to the Court Reporter during the taking of the deposition of R. D. Smith of NEMA to mark certain documents whose description was read into the record by Mr. Keith, not the witness, and by him described as minutes of NEMA. (See, *e.g.,* Deposition of R.D. Smith, pp. 24, 72-75). Moreover, in the case of Exhibit 3007, the letter, there is no evidence of genuineness or that it was sent or if sent that it was received by Whirlpool. (Tr. 6469) In addition, with respect to Exhibit 3010, purported minutes disclosing a discussion of the definition of mass merchandisers for statistical purposes, the very document relied upon purports to show the names of those present and reveals that Whirlpool was not in attendance.

The "foundation" upon which appellants sought the admission of the so-called AHLMA documents, exhibits 3024, 3026 and 3036 is found at pages 3515-3518 of the transcript. Appellants moved their admission because they were found in the files of Norge Sales Corporation which had been dismissed as a defendant prior to trial. No witness testified and no testimony was proffered identifying or otherwise laying any foundation for the admission of these documents.

Second, the contents of the proffered documents, individually and collectively, neither prove the existence of conspiracy nor are they probative of any act in furtherance of conspiracy. The letter, Exhibit 3007, merely mentions a review of the NEMA standards for computing capacity of refrigerators and contains the personal suggestion of the author that manufacturers affix stickers to refrigerators indicating the capacity as measured by NEMA standards to "enlighten the public".

The portions of Exhibit 2093 purporting to be minutes of a NEMA meeting of October 10, 1961, upon which appellants seize and in their brief distort, do not, as appellants state at page li of their Appendix, refer to any discussion of any "new phenomena of mass retailing" or imply that the members should share distribution techniques insofar as selling to "discount houses". Rather the Exhibit referred to a discussion which noted "a new phenomena appears to be going on in the field of mass retailing. Many retail outlets are using appliances as a 'come-on' in order to sell clothing and other products," and contained in the next paragraph an unrelated suggestion that the Association might consider sharing information on advancements in distribution such as "techniques in gathering and combining freight . . ." and the possibility that "accounting procedures could be studied to determine wasteful areas."

Exhibits 2094 and 2095 purporting to be NEMA minutes mention the need for gathering from "mass merchandisers" the final destination of products for purposes of securing more accurate information for the Association's county sales statistics.

Exhibit 2097 purporting to be minutes of the Board of Directors of the Consumer Product Division of NEMA dated April 22, 1961, discloses a resolution by that Board to advise all sections of the Division that they are empowered to disclose their statistical activity to non-members subject to the approval of NEMA counsel, and Exhibit 2098 purporting to be minutes of the Electric Dish-Washer Section covering a meeting held one year later on May 25, 1962 discloses that the Electric Dish-Washer Section voted to open the Section's statistical activities to NEMA members only.

Exhibit 2099 does not disclose, as appellants imply at pages liii-liv of their Appendix, that the members of NEMA decided to exchange information among themselves as to sales by price classifications but rather that the members decided to report *to NEMA* the units sold by price classifications such as those models selling at "less than $95; between $95 and $105 . . .; $156 and over".

Exhibits 3000 and 3004 purport to be NEMA's statistical reports of total industry sales of various appliances.

Exhibit 3003 purports to contain statistics of several Sections of NEMA while Exhibit 3006 purports to be the organizational minutes for the first meeting of the Board of Directors of the Consumers Product Division of NEMA dated January 6, 1960 in which the Board adopted a resolution that in the interest of economy one Committee handle all publicity for all Sections of the Division which related to NEMA; and, contrary to appellants' assertion (Appendix p. viii), there was nothing said to indicate that this Board would coordinate publicity "between manufacturer members." This meeting also reported that AHLMA had adopted a code of advertising practices.

Exhibit 431 was offered during the reading of the deposition of Mr. Judson Sayre of Norge. Appellants, without asking Mr. Sayre or any other witness one question concerning an alleged meeting of NEMA in July, 1960 and without asking Mr. Sayre or any other witness to identify or otherwise lay a foundation for its admission, offered in evidence Exhibit 431, purportedly an interoffice communication of Mr. Sayre to Mr. Bull, both of Norge Sales Corporation, dated July 15, 1960 and a memorandum purportedly handed out at a NEMA meeting the previous day referred to in the inter-office communication. There was no evidence that Mr. Sayre attended such a meet-

ing; much less is there any evidence identifying any others who may have attended the alleged meeting.

Appellants' counsel sought to prove those present at the alleged July 1960 meeting by reading from Exhibits 3006 and 3007 (Tr. 2543), the former purporting to be minutes of a January 1960 meeting of NEMA and the latter being a letter referring to a July meeting but not indicating in any manner who was present. As noted above, both of these documents were themselves excluded for lack of foundation and relevancy. Even if they had been received, they would not have proven who attended the alleged July meeting since one document referred to a January meeting and the other contains no indication of persons attending any meeting. Having completely failed to lay a foundation for introduction of Exhibit 431 as to Whirlpool, it was properly excluded.

Exhibits 3024 and 3036 purport to be no more than industry-wide statistics of inventories and total factory sales with breakdown as to individual companies.

Exhibit 3026 purports to be a letter from AHLMA to Norge Sales Corporation with reference to two meetings attended by counsel for a number of unidentified companies as a result of which at an AHLMA board meeting on October 7, 1959 there was a discussion "as to what might be done to eliminate doubtful advertising practices, fictitious price advertising and to eliminate possible violations of the Robinson-Patman Act, particularly in the promotional allowance area". The only action purportedly taken by those present, and their identity is not disclosed by the Exhibit or any other evidence, was to direct that the Exhibit be sent to the membership and that the subject would be considered in the future.

The foregoing Exhibits were all properly excluded for lack of foundation, and in the case of Exhibits 431, 3007, 3010, 3026 for the additional reason of hearsay. Moreover, those exhibits individually and collectively and those portions taken out of context and distorted by appellants do not, by any stretch of the imagination, support appellants' argument that NEMA or AHLMA were the setting for meetings to discuss price information or to promulgate or to force advertising codes on retailers nor do they disclose, as appellants contend, a "fixed and rigid distribution system with national origins making the boycott one of common purpose and thus easy to enforce and administer."

Obviously recognizing lack of merit in their argument that these documents are probative of improper motives or conduct on the part of the members of NEMA and AHLMA appellants finally cite *American Tobacco Company* v. *United States,* 147 F. 2d 93 (6th Cir. 1944) and argue that all of these documents were admissible for the purpose of showing that the Associations served as a means of communication and gave appellees an opportunity to conspire and act in combination. Even if it be assumed *arguendo* that appellants had laid a proper foundation for the admission of these documents, and that they would serve to prove that appellees had an opportunity to conspire, they prove no more. The charge here made and that which appellants were required to but did not prove was conspiracy, not opportunity to conspire.

THE EXCLUSION OF PORTIONS OF THE DEPOSITION OF ARTHUR ALPINE WAS PROPER AND IN ANY EVENT HARMLESS.

Although the entire deposition of Mr. Alpine who died before his deposition was completed could have been excluded because of the failure of the witness to sign it (Fed-

eral Rule of Civil Procedure 30e, 3 Wigmore, *Evidence* §805, 3rd Ed. 1940), the Court did not order such exclusion. Rather, he excluded only those portions which alluded to the deponent's memoranda and notes of conversations with certain representatives of appellees (Tr. 6277), documents that, although requested had not been turned over to appellees prior to deponent's death. As to these portions of the deposition, the appellees had been deprived of the right to cross-examination and hence their exclusion was entirely proper.

Moreover, the exclusion as far as Whirlpool is concerned was also harmless since it contains no testimony concerning Whirlpool. Appendix A to appellants' brief which sets forth a summary of this deposition (p. xxxii-xxxvii) discloses no conversation with or in the presence of any representative of Whirlpool, and the deposition discloses (p. 210) that Mr. Alpine testified that he did not recall ever having a conversation with any officer or employee of Whirlpool Corporation, and did not know or have any information as to whether any employee of U.S.E. or Manfree had ever had any conversations with any officer or employee of Whirlpool Corporation.

All the conversations to which he testified were conversations outside of the presence of any Whirlpool representatives and hence clearly hearsay as to it and therefore properly excluded for that reason also.

THE COURT PROPERLY EXCLUDED PROFFERED TESTIMONY AND EXHIBITS WHICH WERE HEARSAY AS TO WHIRLPOOL, OTHERWISE INADMISSIBLE AND IN ANY EVENT THEIR EXCLUSION WAS HARMLESS INSOFAR AS THIS APPELLEE IS CONCERNED.

Appellants claim that the exclusion of certain conversations between representatives of appellants and claimed

representatives of the alleged co-conspirators was error. As to appellee Whirlpool these conversations were all hearsay, and properly excluded on the basis of the well-established rule that the declarations of an alleged conspirator, whether or not a defendant are not admissible against any other alleged conspirator unless and until a *prima facie* case of a conspiracy has been proven as to both. Further, the statements must be authorized by the principal and be made during the existence of the conspiracy and in the execution of the common design. (*Standard Oil Co. of California* v. *Moore,* 251 F. 2d 188, 210, 9th Cir. 1957; *Flintkote Co.* v. *Lysfjord,* 246 F. 2d 368, 386, 9th Cir. 1957). As has been previously shown, the appellants have failed to establish a *prima facie* case of conspiracy against Whirlpool. Hence the statements of or with alleged co-conspirators outside the presence of Whirlpool were not admissible against Whirlpool. Included in this category are the following:

(a) Testimony of Bernard Freeman of appellants with reference to a conversation with Jack Mitchell of alleged co-conspirator Lancaster and with representatives of alleged co-conspirator General Electric. (Appendix A to appellants' brief p. xxxix, xlvii, and xix).

(b) Testimony of Marvin Boyd of appellants with reference to conversations with Mr. Newby of alleged co-conspirator Westinghouse, with Mr. Erickson of alleged co-conspirator Hotpoint. (Appendix A to appellants' brief p. xl and xliii).

(c) Testimony of Jack Hangauer of alleged co-conspirator Westinghouse as to his opinion on the market conditions in the San Francisco area. (Appendix A to appellants' brief p. xlii)

(d) Testimony of William Mayben of alleged co-conspirator Graybar with reference to a conversation with representative of alleged co-conspirator Hotpoint. (Appendix A to appellants' brief p. xliv)

(e) Testimony of Joseph Valenson of alleged co-conspirator California Electric with reference to a conversation with Bernard Freeman of appellants. (Appendix A to appellants' brief p. ii)

(f) Testimony of Bert Green of appellants with reference to a conversation with Mr. Bonnet of alleged co-conspirator Graybar. (Appendix A to appellants' brief p. xi)

(g) Testimony of Joseph Mittleman of appellants with reference to a conversation with representatives of the alleged co-conspirator newspapers (Appendix A to appellants' brief p. vi)

(h) Testimony of Vern Brown of alleged co-conspirator Graybar with reference to a conversation with representatives of alleged co-conspirator Hotpoint (Appendix A to appellants brief p. xvii)

(i) Testimony of A. H. Meyer, of alleged co-conspirator Meyer with reference to conversations with representatives of alleged co-conspirator RCA (Appendix A to appellants brief p. xxiii, xxiv)

The numerous Exhibits referred to in Appendix A to appellants' brief and not otherwise heretofore discussed in prior sections of this brief were likewise hearsay as to appellee and hence inadmissible as to it. For this reason it becomes unnecessary to discuss other grounds for

the rejection thereof such as lack of foundation and lack of authority of the declarant.[12]

Moreover, none of the proffered testimony or excluded exhibits would, if admitted, establish that Whirlpool was a party to a conspiracy.

THE EXCLUSION OF EXHIBITS 5068 AND 5082, WORK PAPERS OF MR. HONIG WAS PROPER, AND IN ANY EVENT HARMLESS.

Appellants contend that the rejection of these Exhibits, prepared by Mr. Honig, their accountant, offered as visual aids in support of the already admitted Exhibit 5115, a comparison of Whirlpool and Meyer suggested list prices, was error. The proffered documents simply contained the underlying data supporting the conclusions in Exhibit 5115 which was already received in evidence. The Court therefore properly rejected these as being cumulative, and in any event their rejection was harmless because the information contained in them was already in evidence.

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[12] Obviously with tongue in cheek appellants argue at pages 22 and 169 of their brief that the Court erroneously distinguished between documentary evidence offered as to one conspirator and oral declarations so offered, by admitting all the proffered documents, but refusing to admit the oral declarations of one defendant against all. The Court did not admit all documents against all defendants. If he did appellants would not have devoted thirty pages of their brief to claimed errors in refusing to admit documents. The citations to which appellants refer the Court in this tongue in cheek argument (Tr. 6854) discloses that the Court was referring to and admitted only those documents that were then under consideration.

THE COURT PROPERLY DELINEATED THE ISSUES AS RAISED BY THE PLEADINGS.

Appellants contend at page 130 of their brief that in addition to the single conspiracy involving numerous brands of TV's and major appliances their *one count* complaints charged in paragraphs 7(a) (b) and 10 and their proof and proffered proof established *prima facie* cases of several vertical and disconnected conspiracies including one between Whirlpool, Meyer and Hale to fix and maintain retail prices on appliances and to boycott appellants pursuant thereto.

In paragraph 7 of their complaints to which appellants specifically refer this Court, they allege one, not several conspiracies. They allege that defendants and others restrained trade in the distribution of TV sets and major household appliances in San Francisco and that

> "defendants . . . have and continue to do the following things pursuant to and in furtherance of *the said combination and conspiracy*:" (emphasis added)

Subparagraphs (a) and (b) set forth acts allegedly committed in furtherance of the alleged conspiracy. Paragraph 10 to which appellants also refer this Court states "Each of the retail store operating members of *the conspiracy* . . ."

Thus the very language contained in those paragraphs of the complaints relied upon by appellants in support of their argument that the complaints charge numerous vertical conspiracies effectively refute the argument. These paragraphs, as do the remainder of the allegations (see paragraphs 8, 13 and 14) refer to one and only one conspiracy and though the complaints set forth numerous alleged acts in furtherance of the alleged conspiracy, appellants' claim of conspiracy was clearly set forth in the

singular. Hence the Court properly interpreted the complaint.

Moreover, even if it be assumed *arguendo* that the complaints charged separate vertical conspiracies including one between Whirlpool, Meyer and Hales, appellants' proof and offer of proof was not sufficient to establish a *prima facie* case against Whirlpool. The offer contained no proffer of evidence over and beyond that offered in support of the charge of a single conspiracy, and appellants counsel advised the Court that the evidence of separate conspiracies was the same as that claimed to show a single conspiracy. (P. Tr. July 23, 1965 p. 7).

It would unduly lengthen this brief to restate the reasons why the Court correctly excluded the proffered evidence and why the evidence in the record and all that was proffered, even if received, would no more establish that Whirlpool was a party to a separate vertical conspiracy than a single conspiracy. Suffice it to say that the record discloses no evidence that Whirlpool was aware of or participated in any conspiracy, horizontal or vertical. Accordingly, if it be assumed *arguendo* that the Court erred, the error was harmless insofar as that ruling applies to Whirlpool.

THE COURT PROPERLY SEPARATED THE TRIAL ON THE ISSUES OF LIABILITY AND DAMAGES, AND IN ANY EVENT THE SEPARATION WAS HARMLESS.

Nor was there any error committed or harm resulting from the Court's order separating the issue of liability from that of damages.

Rule 42(b) of the Federal Rules of Civil Procedure provides:

> "The court in furtherance of convenience or to avoid prejudice may order a separate trial . . . of any separate issue or . . . issues."

Whether issues should be separated is a question directed to the sound discretion of the trial court. Thus this Court in *Richmond* v. *Weiner,* 353 F. 2d 41, 44-45 (9th Cir. 1965) held:

> "A Federal trial court in its discretion may upon its own motion properly separate an issue from others and confine the introduction of evidence to that separated issue alone if the court in the exercise of reasonable discretion thinks that course would save trial time or effort or make the trial of other issues unnecessary . . . Whether there should be severance and separate trial of an issue is primarily a question concerning the court's trial procedure and convenience, not a question concerning the merits of the case." See also *Ammensmaki* v. *Interlake S. S. Co.,* 342 F. 2d 627, 7th Cir. 1965; *Durham* v. *Southern Ry.,* 254 F. Supp. 813, D. C. Va. 1966; *Mannke* v. *Benjamin Moore & Co.,* 251 F. Supp. 1017, D. C. Pa. 1966; *Cataphote* v. *DeSoto Chemical Coatings, Inc.,* 235 F. Supp. 931, D. C. Cal. 1964.

Anti-trust cases present those problems which make the separation of issues desirable. See *Orbo Theatre Corporation* v. *Loew's, Inc., et al.,* 156 F. Supp. 770, 1957, aff'd. 261 F. 2d 380, D. C. Cir. 1958; *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.,* 154 F. Supp. 471, N. D. Ill. 1957, modified sub nom., 258 F. 2d 831, 7th Cir. 1958; *Reines Distributors, Inc.* v. *Admiral Corporation,* 257 F. Supp. 619, S. D. N. Y. 1965; see also *Independent Ironworks, Inc.* v. *United States Steel Corporation,* 177 F. Supp. 743, N. D. Cal., 1959.

Thirty-eight trial days were consumed by appellants in presenting their case of "liability". While one can merely

surmise how much additional time would have been consumed had the court not separated the issues, freeing the court, the jury and the litigants from spending *any* time devoted to the presentation of evidence of alleged damages in view of appellants' failure to prove a *prima facie* case of liability would seem to establish beyond question, not only that the trial court did not abuse its discretion, but the soundness of the court's order separating the issues.[13]

THE COURT PROPERLY EXCLUDED THE STUDIES PURPORTING TO SHOW THE RETAILERS' TAG PRICES, AND IN ANY EVENT THE EXCLUSION WAS HARMLESS.

Appellants complain of the Court's exclusion of Exhibits 1560 to 1681 purporting to be studies showing a comparison of distributors and certain manufacturers suggested list prices with the tag prices of Hales (Exhibits 1561-1578), Lachman (Exhibits 1579-1681) and Redlick (Exhibit 1560). Appellants contend that these studies establish that the suggested retail prices and the tag prices were the same. The exclusion of these Exhibits insofar as Whirlpool is concerned was proper and in any event harmless for several reasons. First, the studies did not purport to compare prices suggested by Whirlpool but rather prices suggested by Meyer, an independent distributor, whose suggested prices were promulgated and issued without any participation by or consultation with Whirl-

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[13] Appellee would further note that had the issue of liability been submitted to and determined by the jury against appellees or any of them, the same jury would have heard evidence of and determined the question of damages so that separation in that event would likewise not have been harmful.

pool.[14] (Tr. 649). Secondly, since the record contained no independent proof of conspiracy much less that Whirlpool was a conspirator, these Exhibits were hearsay and hence inadmissible against this Appellee.

In addition, the conspiracy is alleged to have taken place in San Francisco. Appellants admit that the Exhibits were prepared from orders for stores of the alleged conspirators in San Francisco and elsewhere. (Tr. 6380-6381). Insofar as the record is concerned all of the orders may have involved stores other than those located in San Francisco. Further the documents on their face reveal that they contained assumptions of the witness. For example, Exhibit 1558 has the remark "apparently special numbers". The witness through whom appellants sought to introduce these documents was an accountant and had no personal knowledge of the industry or the transactions shown on the summaries. He could not have testified orally as to whether or not a particular model was or was not a "special model" and this was not shown on the underlying documents from which the "summaries" were made. Obviously he should not be permitted to do by indirection—the introduction of his summary—that which he could not do directly.

Moreover, neither the suggestion of nor voluntary adherence to suggested prices is illegal, and the record disclosed no agreement on the part of Whirlpool to maintain suggested prices. Accordingly, the exclusion was certainly harmless.

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[14] After July 1961 Whirlpool made no suggestion of retail prices and during the period when it did, appellants' own Exhibit (Tr. 5115) discloses that Whirlpool's suggested retail prices and those of its distributor, Meyer, differed in 40% of the instances considered.

THE COURT PROPERLY DENIED REQUESTS FOR DISCOVERY OF DOCUMENTS AND CORRECTLY SUSTAINED OBJECTIONS TO INTERROGATORIES AND IN ANY EVENT ITS RULINGS WERE HARMLESS.

(a) Appellants claim that the denial of Item 15 of its First Motion for Production of Documents of June 5, 1964 (R. 422, 425) was error. (Appendix A to appellants' brief, p. lxii; appellants' brief, p. 172) This Item sought production of:

> "*All* intra-office reports, memoranda or notes pertaining or relating to the plaintiffs above-named or the retail defendants above named during the above period of time." (emphasis added)

This request was too broad and hence lacked the requisite showing of "good cause". (Rule 34 Federal Rules Civil Procedure; *United States* v. *Great Northern Ry.*, 18 F. R. D. 357, N. D. Cal. 1955).

A retail defendant's complaint about the quality of a product and similar documents which obviously would not be relevant to this litigation, would be comprehended by the above overly broad request and if allowed would have required Whirlpool to search through all of its records in all of its departments to discover whether they contained *any* documents that remotely related or pertained to any retail defendant regardless of the subject matter thereof. The Court properly held this request too broad, but did order production of those documents to which appellants were entitled (see First Motion for Production of Document Items 12, 17-23, R. 599-600).

(b) Appellants complain of the Court's ruling sustaining Whirlpool's objection to Interrogatories No. 2, 3, 4, 5, and 6 of its First Interrogatories of September 29,

1964. (R. 625-627; Appendix A to appellants' brief, p. lxiii; appellants' brief, p. 174) Interrogatory No. 2 asked:

> "State whether or not there exists a written statement or written statements or reports reflecting any conversations between an employee, officer, agent or representative of your company, . . . and any other person having to do, . . . with the acquisition, sale or advertising of television sets or major household appliances by the plaintiffs in the above-entitled action . . . or the retail defendants in the above-entitled action . . ."

Interrogatories No. 3, 4, 5, and 6 requested the dates, locations and custodians of such documents and whether or not they were claimed to be privileged.

These Interrogatories suffered from the same malady of being overly encompassing and broad as did the foregoing request for documents. The acquisition, sale and advertising of such products by retail dealers embraces a wide range of activities which could have no possible relevance to the issues in this case—an alleged conspiracy to boycott the plaintiffs and to maintain suggested list prices.

When appellants propounded interrogatories which were narrowed to the issues, Whirlpool made answer thereto. Thus Whirlpool responded to appellants' Second Interrogatories Directed to All Defendants (December 7, 1964; R. 790, 791-792) in which appellants inquired into the existence of any statements, reports, memoranda or documents reflecting conversations between officers or employees of defendants with respect to any "agreement, understanding, policy, stated or suggested, concerning retail prices and terms and conditions thereof, in which household appliances or television sets have been sold, shown for sale or

advertised for sale during the applicable period by the retail defendants in this action." (Interrogatories Nos. 4 and 5).

(c) Appellants complain of the denial of the production of certain documents described under Items 20, 22 (c)-(e) and 27(f) in their Second Motion for Production of Documents. (November, 1964; Appendix A to appellants' brief, p. lxiii; appellants' brief, p. 175).

The gist of Item 20 (to which Whirlpool did not object), was a request for all letters received by the defendants from the appellants and any memoranda concerning these letters. This item was granted as to any writings on the original letters received from appellants and any inter-office memoranda relating to said letters. (Order on Motion of Plaintiffs for Production of Documents p. 3, R. 1019). It is difficult to perceive appellants' complaint concerning this ruling since it denied them only copies of Whirlpool letters sent to them, the originals of which were received by appellants and placed in evidence.

Appellants complain of the denial of Item 22(c) and 22(d), the former requesting the production of letters concerning conversations between Whirlpool and its distributor with reference to preventing the appellants from obtaining major appliances, and the latter requesting documents with reference to letters between Whirlpool and its distributor as to conversations with officers or agents of retail dealers concerning prices, suggested prices or advertising. Whirlpool did not object to these portions of Interrogatory 22, and more important, production of almost all of these documents had been previously ordered by the Court. (Appellants' First Motion for Production of Documents Items 18 and 19, R. 599-600) Further in answer to appellants' Second Interrogatories referred to

above, Whirlpool specifically stated that *no* statements, reports, memoranda or *other document existed* as to any conversations between a Whirlpool officer or agent in which U. S. E. or Manfree were mentioned, and also that *no* statement, report, memoranda or *other document existed* of any conversations between Whirlpool's officers or agents and those of an officer or agent of any other defendant as to any agreement, understanding or policy concerning stated or suggested retail prices at which household appliances or television sets have been sold, shown for sale, or advertised for sale during the applicable period by the retail defendants in this action. (Plaintiffs' Second Interrogatories Nos. 1, 2, 4, 5, R. 1050-1052) Hence, insofar as Whirlpool is concerned, no documents of the type requested by appellants existed and the denial of its request for production was proper and harmless.

Item 22(e) requested letters of Whirlpool to its distributor concerning the "sale or possibility of sale" to certain specified discount stores in the San Francisco area. This correspondence had previously been ordered produced by the Court's order of September 8, 1964 to produce correspondence to the distributor concerning whether "RCA-Whirlpool major household appliances should be sold to plaintiffs or any other discount house in the San Francisco Bay area." (Appellants' First Motion for Production of Documents Items 18 and 19, R. 599-600)

Item 27(f) requesting documents and notes of certain trade association meetings which pertained to Discount Department Stores or Mass Merchandising Stores was properly denied as appellants failed to meet the requisite showing that any such documents existed or were in the possession or custody of Whirlpool. (*William A. Meier Glasgow* v. *Anchor Hocking Glass Corp.*, 11 F. R. D. 487,

491, 1951). Appellants deposed representatives of such trade associations which had custody of such documents. Further, the appellants had been granted, in their First Motion for Production of Documents (R. 599-600), their requests for the type of documents relating to this subject that might have been in Whirlpool's possession; namely, all speeches of any officer or sales manager of Whirlpool to any association pertaining to selling discount stores or mass merchandising stores. (Item 22).

(d) Contrary to appellants' statement that the Court refused to require Whirlpool to answer Interrogatories Nos. 1, 2 and 6 of Appellants' Second Interrogatories addressed to all defendants (Appendix A to appellants' brief, p. lxiii), the Court ordered these interrogatories answered but limited the answer of these overly broad interrogatories to information available to Whirlpool, its officers and employees whose responsibility involved the sale or advertising in Northern California of Whirlpool products and further struck the words "by implication" from Interrogatories 1 and 2, which asked in part for statements, reports, etc., where U. S. E. or Manfree were mentioned (separately or in any other way) expressly "or by implication".

Appellants claim that the order sustaining objection to Interrogatory No. 3 of appellants' Second Interrogatories (Appendix A to appellants' brief, p. lxiii) was error. This Interrogatory asked for the existence of any statements, reports or memoranda reflecting any conversations during the applicable period "between your attorneys" and any officer or agent, employee or other person acting in behalf of any defendant in this litigation in which U. S. E. or Manfree were mentioned. The Court properly denied this Interrogatory as this was an obvious attempt to invade the work product of Whirlpool's attorneys. (*Trans-*

mirra Product Corp. v. *Monsanto Chemical Co.*, 26 F. R. D. 572, 578-580, S.D. N.Y. 1960).

THE EVIDENCE AS TO THE KLOR'S LAWSUIT AND THE TESTIMONY OF MR. FRACTENBERG WERE PROPERLY EXCLUDED.

Appellants claim that the Court improperly excluded the proffered testimony of Mr. Sam Fractenberg who previously had been an officer of Klor's, Inc. and the deposition testimony of Mr. Klor taken in a different case. In contravention to local Court Rule 4 (11) the appellants failed to list Mr. Fractenberg or any other Klor's witness in their pre-trial statement. The appellants' failure to list this witness as required by the rule was grounds for the exclusion of this testimony.

Moreover, the proffered deposition of Mr. Klor that was taken in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.* (359 U.S. 207, 1959) was properly excluded as to Whirlpool because, though Whirlpool was originally a party to that suit, before the time the Klor's deposition was completed it had been dismissed as a party and hence admission of the deposition testimony of Mr. Klor would have denied Whirlpool the right of cross-examination. Also, this testimony which would have been simply a rehash of events from June, 1955 to January, 1957 (Tr. 5668; 5681-5682), was further not relevant to the issues before the Court as it involved collateral and unrelated matters.

THE DISTRICT COURT PROPERLY TAXED CERTAIN COSTS.

Section 28 U.S.C. §1920(a) (1964) permits the taxation of "stenographic transcripts". Each one of the categories of costs claimed by the appellants to have been improperly taxed—trial transcripts, depositions, pre-trial transcripts,

and reproduction of Exhibits, were held to be properly taxable in cases in this very court. (See *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 322 F. 2d 656, 1963; *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 1964; see also *Pearlman* v. *Feldman*, 116 F. Supp. 102, D. Conn. 1953). Certainly, it cannot be said that the trial court overstepped the bounds of its discretion, in taxing the foregoing costs to appellants in this complex and involved case.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment for appellee, Whirlpool Corporation, should be affirmed.

Dated: APR 24, 1968.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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